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R.B., Appellant)	
)	
and)	Docket No. 18-0945
)	Issued: April 3, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Braintree, MA, Employer)	
)	

Case Submitted on the Record

Richard Heavey, Esq., for the appellant¹
Office of Solicitor, for the Director

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

On April 4, 2018 appellant, through counsel, filed a timely appeal from an October 25, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated July 13, 2017, to the filing of

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.³

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On March 26, 2013 appellant, then a 61-year-old city carrier, filed an occupational disease claim (Form CA-2) for a bilateral knee condition that allegedly arose while in the performance of duty. After years of walking on even and uneven surfaces delivering mail, appellant allegedly experienced constant pain in both knees. He described his condition as right knee arthritis and left knee torn meniscus. Appellant first became aware of his condition and its relationship to his federal employment duties on February 22, 2012.

A February 22, 2012 report noted bilateral knee x-rays revealed normally mineralized bones, no soft tissue abnormalities, and that the joint spaces were maintained.

In an August 30, 2012 report, Dr. Geoffrey J. Van Flandern, a Board-certified orthopedic surgeon, diagnosed moderate bilateral knee osteoarthritis, medial compartment. He noted that appellant had been a letter carrier since 1987. In an October 26, 2012 follow-up report, Dr. Van Flandern diagnosed bilateral medial meniscus tearing.

A magnetic resonance imaging (MRI) scan of both knees dated October 31, 2012 revealed a torn left medial meniscus and on the right there was no evidence of meniscus, cruciate, or collateral ligament tear. However, the right knee MRI scan showed a small knee effusion and mild patellar chondromalacia.

In follow-up treatment reports dated November 9, 2012, March 29 and July 26, 2013, Dr. Van Flandern continued to diagnose left knee medial meniscus tear. He recommended that appellant perform regular duty effective March 29, 2013. In his July 26, 2013 report, Dr. Van Flandern indicated that appellant's left knee condition was work related. He continued to find appellant capable of performing full/regular-duty work.

In a development letter dated July 9, 2013, OWCP requested that appellant submit additional evidence in support of his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. By separate letter of even date

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the October 25, 2017 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

OWCP also requested additional information from the employing establishment. It afforded both appellant and the employing establishment 30 days to respond.

By decision dated August 14, 2013, OWCP initially denied the claim because appellant had failed to establish fact of injury. It found that appellant had not responded to the development letter and; therefore, there was an insufficient factual basis for the claim. On September 3, 2013 appellant requested reconsideration and submitted a statement in response to the development questionnaire.

By decision dated December 2, 2013, OWCP modified its prior decision and found that fact of injury had been established. However, appellant's occupational disease claim remained denied because the medical evidence of record failed to establish causal relationship between appellant's condition(s) and the accepted factors of his federal employment. On December 2, 2014 counsel requested reconsideration.

By decision dated January 30, 2015, OWCP denied modification of its prior decision after reviewing the merits of appellant's claim.

On December 21, 2015 counsel requested reconsideration and asserted that the medical evidence of record was sufficient to establish causal relationship between the accepted factors of appellant's federal employment and his bilateral knee conditions.

In a December 1, 2015 report, Dr. Byron V. Hartunian, a Board-certified orthopedic surgeon, diagnosed internal derangement of the left knee with torn medial meniscus and anterior cruciate ligament sprain, osteoarthritis of the left knee, internal derangement of the right knee with torn medial meniscus, and osteoarthritis of the right knee. He opined that appellant developed his knee conditions during the course of his federal employment.

In a February 29, 2016 letter, OWCP notified appellant that it had evaluated the evidence submitted, but required missing medical evidence for further action to be taken on his request for reconsideration. It noted that Dr. Hartunian's December 1, 2015 report referenced a report from Dr. Van Flandern dated September 26, 2014 and a right knee MRI scan dated August 6, 2015, but neither document had been received. OWCP afforded appellant 15 days to submit the requested evidence.

In response, appellant submitted Dr. Van Flandern's September 26, 2014 report. Dr. Van Flandern opined that appellant "may be developing arthritic change that is in some fashion related to his extensive mail carrier work duties since 1987," and further opined that appellant had "no direct mechanism or direct injury mechanism which would allow [him] to more directly and casually relate the ongoing knee problems to his job duties or his job responsibilities."

An August 6, 2015 MRI scan of appellant's right knee demonstrated blunting of the anterior horn and body of the medial meniscus, consistent with free-edge tear, and grade 1 medial collateral ligament (MCL) sprain.

By decision dated June 10, 2016, OWCP denied modification of its prior decision, finding that the medical evidence of record was insufficient to establish causal relationship.

On February 13, 2017 counsel requested reconsideration and reiterated his argument that the medical evidence established causal relationship.

In a December 12, 2016 report, Dr. John J. Tierney, a Board-certified orthopedic surgeon, opined that appellant's duties of carrying satchels weighing 35 to 70 pounds and walking up to three to five miles per day is "a leading cause of the prevalence of lower extremity arthritis among letter carriers."

By decision dated July 13, 2017, OWCP denied modification of its prior decision, finding that Dr. Tierney's opinion was insufficiently rationalized to establish causal relationship and merely expounded upon Dr. Hartunian's opinion, which had previously been found to be insufficient to establish the claim.

On October 11, 2017 counsel requested reconsideration and submitted a brief reiterating his argument that the medical evidence of record was sufficient to establish causal relationship.

In a September 25, 2017 report, Dr. Tierney reiterated that, with a high degree of medical certainty that was corroborated by Dr. Van Flandern and Dr. Hartunian's reports, appellant's condition had a direct causal relationship to not only the injury that he sustained in 2012, but additional degradation due to the activities of his work.

By decision dated October 25, 2017, OWCP denied appellant's request for reconsideration of the merits of his claim.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁴ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁵ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁶ A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁷ When a timely application for reconsideration does not meet at least one

⁴ This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607.

⁶ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be "received" by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the "received date" in the integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

⁷ 20 C.F.R. § 10.606(b)(3).

of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.⁸

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

Appellant's October 11, 2017 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. In support of his reconsideration request, appellant submitted a legal brief dated October 5, 2017 from his attorney who asserted that the medical evidence of record was sufficient to establish that the implicated employment factors were causally related to his diagnosed conditions of left knee medial meniscus tear and bilateral knee osteoarthritis. The Board finds that the submission of this argument did not require reopening appellant's case for merit review because, in its decisions dated June 10, 2016 and July 13, 2017, OWCP acknowledged the same argument supporting the prior two requests for reconsideration and found that the medical evidence was insufficient to establish causal relationship. The Board thus finds that appellant has not advanced a relevant legal argument not previously considered by OWCP. Consequently, appellant is not entitled to further review of the merits of his claim based on the first or second above-noted requirements under section 10.606(b)(3).⁹

Appellant also failed to submit relevant and pertinent new evidence not previously considered by OWCP. Counsel submitted a September 25, 2017 report from Dr. Tierney who reiterated that with a high degree of medical certainty that was corroborated by Dr. Van Flandern's and Dr. Hartunian's reports, that appellant's condition had a direct causal relationship to not only the injury that he sustained in 2012, but additional degradation due to the activities of his work. The Board finds that submission of this report did not require reopening appellant's case for merit review. As OWCP had denied appellant's claim based on the lack of supportive medical evidence establishing causal relationship and because Dr. Tierney's report repeats evidence already in the case record, it is cumulative and fails to constitute relevant and pertinent new evidence. Therefore, this evidence is insufficient to require OWCP to reopen appellant's claim for consideration of the merits pursuant to the third criteria under section 10.606(b)(3).¹⁰

The Board finds that appellant has not met any of the three regulatory requirements under section 10.606(b)(3). Therefore, pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹¹

⁸ *Id.* at § 10.608(a), (b).

⁹ *Id.* at § 10.606(b)(3)(i) and (ii).

¹⁰ *Id.* at § 10.606(b)(3)(iii); *see L.H.*, 59 ECAB 253, 256 (2007).

¹¹ *See D.R.*, Docket No. 18-0357 (issued July 2, 2018); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the October 25, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 3, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board